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In the case which is the subject of this comment, case No. 2, the lien of the city of New York was terminated as to the city by the payment of the assessments, nevertheless it could be regarded as still existent for the purpose of doing justice between the party who had paid them and the owners of the land. The land having been converted into money in the pockets of the defendants, the lien attaches to the money and is enforceable against it. The conclusion thus reached is predicated upon the assumption that the payment of the assessments was purely gratuitous and in no wise in discharge of any real or supposed obligation on the part of the estate of Andrew H. Green or of the unknown forger, but was brought about solely by the mistake induced by the forgery. Case No. 1, *supra,* is in all respects the same as case No. 2, *supra,* save that the taxes had been levied within the lifetime of the defendants' testatrix and were for her personal debts chargeable against her estate; wherefore the money represented by the forged check could not be regarded as having been applied to relieve the devised premises from the lien. This fact differentiates case No. 1 from case No. 2. The equitable doctrine of subrogation was held unavailable to the plaintiff under the facts in case No. 1. R E. B.

WHAT ARE THE RIGHTS OF THE VENDOR OF GOOD WILL?—Various attempts have been made to answer this question by defining the term "good will" and in this way determining what passes to the vendee and, *e converso,* what rights are left to the vendor. Lindley, however, says, "the term good will can hardly be said to have any precise signification." LINDLEY-EWELL, 2nd Ed., 439. Though indefinable the term is said to be divisible, as in the case of *Foss* v. *Roby* (1907), 195 Mass. 297 ,where it is said, following previous decisions, that in a commercial partnership the good will is largely local in character whereas in a professional partnership it follows the person not the place. The courts have attempted to answer the larger question by resolving it into a number of smaller ones based on the varying states of fact. May the vendor set up again in a similar business? Answered in the affirmative in *Churton* v. *Douglas* (1859), 1 Johns, 174, 188. May he advertise? Answered in the affirmative in *Cottrell* v. *Manufacturing Co.* (1886), 54 Conn. 138. May he solicit old customers? Answered in the negative in *Trego* v. *Hunt* [1896], 1 A C. 7. The decision in this last case has been frequently quoted as the English Rule The case of *Williams* v. *Farrand* (1891), 88 Mich. 473, had said the retiring partner might solicit old customers, though in this case only "the right, title and interest" had passed, good will not being expressly mentioned.

A recent Massachusetts case, *Marshall Engine Co.* v. *New Marshall Engine Co.* (1909), 89 N. E. 548, answers this question without reference to the so-called English Rule, above referred to, and also without appealing to any of the American cases which are spoken of as being directly opposed to the principle of the English Rule.

The facts of the Massachusetts case are somewhat complicated but the real defendant is one F. J. Marshall who, in September, 1902, sold to the plaintiff corporation, called the Marshall Engine Co., the "good will of the

business carried on by the vendor under the firm name of F. J. Marshall * * *" The plaintiff manufactured and sold several of the Marshall Perfecting Engines. Marshall also "on his own account and with his own funds did certain business in connection with the Marshall Perfecting Engine, * * * consisting of repairs, etc." On June 15, 1905, the plaintiff corporation was declared insolvent and a receiver appointed. Eight days later, F. J. Marshall caused the New Marshall Engine Co. to be incorporated in Massachusetts and continued under the name of this new company to manufacture the engines. The suit is brought in effect by the creditors of the plaintiff corporation (through the receiver of it) to enforce the rights secured by the corporation from Marshall in the purchase from him of the good will of the business then carried on by him. On the facts disclosed in the record the New Marshall Engine Co. is simply F. J. Marshall in another form.

The court decided that Marshall might be restrained from further interference with the interests of the Marshall Engine Co., following its own previous decisions to the effect that no competing business may be set up in derogation of the grant of the good will of a business upon the sale, it being found in this case that the defendant's actions were in derogation of his grant to the plaintiff company.

The phrase "derogation of the grant" used as a working formula for the decision of these cases was restored to its rightful place by the Massachusetts court only within the last decade. By the decision in the case of *Trego* v. *Hunt, supra,* the respondent [who had agreed that the good will of a partnership was vested in his partner] was enjoined "from applying privately, by letter, personally, or by a traveller, to any person who was, prior to the dissolution of the partnership, a customer of the firm of Tabor, Trego and Co., asking such customer to continue after the dissolution to deal with him, the respondent, or not to deal with the appellant." The decision by the House of Lords in this case, reëstablishing the authority of *Labouchere* v. *Dawson* [1872] L. R. 13 Eq. 322 and overruling *Pearson* v. *Pearson* (1884), 27 Ch. Div. 145, has been since quoted as a settled rule of law, stated by the Illinois court (Cf. *Ranft* v *Reimers* (1902), 200 Ill. 393), in the form, "the vendor of a good will is not entitled to canvass customers," the courts that decide these cases in the opposite way usually denying the validity of the rule of law. (For the conflicting decisions see 5 MICH. L. REV. 295). As late as 1902 we find the Massachusetts court saying that it is still an open question in that commonwealth whether one who has sold the good will of a business may solicit old customers, *Webster* v. *Webster,* 180 Mass. 316. It was not until the case of *Hutchinson* v. *Nay,* 187 Mass. 262, came before the Massachusetts court, in 1905, that this court began to recognize that there was a difference between the law which had been established in England and that established in Massachusetts, although the court does not state plainly that the difference consists in a change in the principle upon which these cases are decided. *Trego* v. *Hunt* answers in the negative the question "may the seller of the good will solicit old customers" and this decision has been taken as the pronouncement of a principle of law though it is really the answer on the state of facts in *Trego* v. *Hunt* of the entirely

different question; namely, "May the vendor derogate from his grant"? which of course can be answered only in the negative. (Cf. *Hutchinson* v. *Nay, supra,* p. 265, where this statement of the question is attributed, apparently erroneously, to the case of *Webster* v. *Webster,* 180 Mass. 310). The Massachusetts court in the principal case makes it perfectly plain in what respect it differs from the English courts. In England "a competing business always can be set up by one who has sold his good will. * * * And a purchaser of good will gets nothing more than the right to have the vendor refrain from soliciting customers of the old firm." In Massachusetts on the other hand, "no competing business may be set up if it derogate from the grant of the good will of the old business." Furthermore in Massachusetts the question as to whether the acts of the vendor do or do not derogate from the grant is not a question of law to be settled by any specific "rule," but is in all cases a question of fact for the jury, the Massachusetts court reiterating in this particular the doctrine laid down in its own recent cases of *Foss* v. *Roby, supra,* (Cf. 6 MICH. L. REV. 93), and *Old Corner Bookstore* v. *Upham,* 194 Mass. 101. We have thus one more demonstration of the futility of rules of law as a means of settling these hard questions, and a further illustration of the tendency of the courts to throw the burden on the jury in the actual trial of the specific case. J. H.D.

ATTACHMENTS ON UNLIQUIDATED DEMANDS.—If the creditor should not have the aid of attachment to recover on unliquidated demands, why not? It is true that attachment as a security for the satisfaction of the judgment that may be recovered in an action pending or just commenced was unknown to the general common law of England, and existed only in a restricted form as a special custom of London and other places in the form of garnishment till it was introduced into the New England colonies by an early statute of Massachusetts, whence its utility commended it so that it was soon adopted in all the colonies. Therefore, it may be said that if there is no authority for attachment on unliquidated demands under the statute there is no authority at all—that the proceeding is purely statutory, and authority must be found in the statute for each case.

But this argument does not apply to the point now under discussion under any of the statutes so far as we are aware; for whether the statute permits attachment "in any action on contract," or "in any action for the recovery of money only," or "in any action for the recovery of damages," which are some of the most common statutory forms of expression, actions for unliquidated damages are as much included within the terms of the statutes as actions on liquidated demands. This argument, when applied to this class of cases works to the opposite conclusion. The argument when applied to this class of cases would be, that it is for the legislature to say what cases they will extend the new remedy, and it is not for the court to deny it if the legislature has given it, though inconvenience may follow. The fact is that this old stock argument against attachments and garnishments in all debatable cases never was much heard on this class of cases. Why then has not